

**Summary of SC89840, Saint Louis University and Paulo Bicalho, M.D. v. Alice Geary, Individually and as Personal Representative of the Estate of Phillip Sgroi**  
Appeal from the St. Louis city circuit court, Judge Margaret M. Neill  
Opinion issued Nov. 17, 2009

**Attorneys:** Saint Louis University and Bicalho were represented by Robyn Greifzu Fox, Philip L. Willman and Catherine Vale Jochens of Moser & Marsalek P.C. in St. Louis, (314) 421-5364; and Geary was represented by Derek H. Potts and Patricia L. Campbell of The Potts Law Firm LLC in Kansas City, (816) 931-2230.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A doctor and his employer appeal a judgment finding them liable for damages in a medical negligence suit. In a 7-0 decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri affirms the trial court's judgment. The erroneous admission of certain videotape evidence did not prejudice the doctor and his employer; the trial court did not abuse its discretion in denying a mistrial because of an improper insurance question asked during jury selection; and the trial court did not abuse its discretion in overruling a motion for a new trial for a juror's unintentional failure to disclose a previous lawsuit he filed after being injured in an automobile accident. Special Judge John E. Parrish, a senior judge of the Missouri Court of Appeals, Southern District, sat in for Judge Michael A. Wolff.

**Facts:** Phillip Sgroi suffered a stroke in 2000 that affected his left side and his ability to walk. While on a trip in December 2001, he slipped and fell on his left side. When he sought emergency treatment, he was diagnosed with a left arm fracture and a left knee contusion. After returning to St. Louis two days later, he was admitted to Saint Louis University Hospital. After discharge, he received inpatient rehabilitation. When he subsequently was readmitted to the university's hospital for issues including severe knee pain, his wife, Alice Geary, requested an orthopedic consult. In February 2002, orthopedic surgeon Dr. Paulo Bicalho examined Sgroi, ordered X-rays of Sgroi's knee but not his hip, and ultimately diagnosed Sgroi with left knee pain and recommended that Sgroi be sent home with continued physical therapy. After Sgroi had been home for a week, his pain was so bad he could not straighten his left lower leg. He returned to the hospital, where an X-ray revealed a femoral fracture that was old enough to have existed at the time of Bicalho's consultation. Sgroi underwent surgery on his left hip in which he received a prosthetic femur head. After discharge, he began several years of physical therapy, during which he temporarily regained his ability to walk short distances using a walker. Pain ultimately caused him to stop physical therapy and undergo another hip surgery, during which doctors discovered Sgroi's hip prosthesis and hip joint were infected and had to be removed, causing Sgroi to lose his ability to walk permanently.

Sgroi and Geary sued the university and Bicalho, alleging they were negligent in failing to diagnose and treat his hip fracture in a timely manner. Geary also sued for loss of consortium. Sgroi's medical condition precluded him from being present during the June 2007 trial, and so portions of two videotapes of Sgroi were played for the jury. The jury returned a verdict against the university and Bicalho, awarding Sgroi \$775,000 for his negligence claim and Geary \$50,000 for her loss of consortium claim. Following a subsequent hearing, the trial court overruled the university and Bicalho's post-trial motions. They appeal.

## **AFFIRMED.**

**Court en banc holds:** (1) Although the trial court erred in admitting into evidence certain portions of a videotape of a personal interest news story about Sgroi – filmed after he recovered from his stroke but before his December 2001 fall – the university and Bicalho were not prejudiced. The trial court excluded portions of the videotape but overruled the university and Bicalho's objection to the rest of the videotape and permitted the jury to view it. In determining whether a videotape is admissible, the proper inquiry is whether it is practical, instructive and calculated to assist the trier of fact in understanding the case.

(a) The trial court reasonably concluded the portion of the videotape showing Sgroi walking with a healthcare provider during physical therapy was more probative than prejudicial. The effect of the alleged negligence on Sgroi's mobility was a primary factor in his claim for damages, and this portion offered the jury valuable insight into Sgroi's physical and mental abilities after his stroke but before the negligent act. As such, it would assist the jury in fairly determining the full extent of his injuries for the purposes of assessing damages.

(b) The trial court reasonably concluded that Sgroi's statements in the videotape were not being submitted for the truth of what he said but rather to show his mental abilities and attitude before the alleged negligent acts. The audio of these statements allowed the jury to observe that Sgroi was articulate, vivacious and enthusiastic about life, which is relevant to the issue of his injury and his mental abilities.

(c) The trial court erred in admitting portions of the videotape containing the news anchor's introductory remarks, the news reporter's commentary, and comments by Geary and Sgroi's physical therapist and doctor. These portions include out-of-court statements that do not fit within any exception to the rule barring hearsay (out-of-court statements offered in court to prove the truth of the matter asserted) and have no nonhearsay purpose. Admission of these portions was not prejudicial, however, because they were cumulative to other evidence admitted without objection, including Geary's testimony that Sgroi worked very hard to recover

after his stroke and Sgroi's deposition testimony that he intended to run for elected office in the future.

(2) The trial court did not abuse its discretion in denying a mistrial after counsel for Sgroi and Geary improperly identified a particular company as an insurance company during jury selection, thereby injecting insurance into the case. Parties to litigation have a right to know whether jurors or their families have an interest in the outcome of litigation, including whether jurors or their families work for a company that provides insurance to one of the parties and may be liable for paying part of the verdict. In Missouri, to ask the "insurance question," a party first must get the trial court's approval of the proposed question outside the hearing of the jury panel, ask only one "insurance question," and ask the question in a way that avoids unduly highlighting the question to the jury panel. *Ivy v. Hawk*, 878 S.W.2d 442, 445 (Mo. banc 1994). Here, outside the presence of the jury panel, counsel for Sgroi and Geary advised the court he wanted to ask the insurance question, asked one question, and did not make the question the first or last asked, but he did not get the court's approval of the specific question he asked: "Is anybody here an officer, director, or shareholder of an insurance company called The Doctor's Company?" Although *Ivy* stands for the proposition that the word "insurance" should not be injected into the question when not part of the insurance company's name, it does not require declaration of a mistrial if the accepted procedure for asking the question is not followed precisely, and mere use of the word "insurance" alone does not warrant reversal or a mistrial. The university and Bicalho fail to prove counsel used the words "insurance company" in bad faith, and the record supports the trial court's finding that use of the word "insurance" was not in bad faith. Further, there is no evidence of grievous error where prejudice otherwise could not be removed, because there is no evidence that the award of \$775,000 was excessive.

(3) The trial court did not abuse its discretion in overruling the university and Bicalho's motion for a new trial because a juror failed to disclose he had filed a lawsuit for injuries from an automobile accident. The nondisclosure here was not intentional. Although it is not reasonable to believe the juror's explanation that his mind wandered or that he was not paying attention – there were multiple questions asked during jury selection about filing lawsuits – the evidence supports a finding that the juror forgot about the lawsuit because he perceived it to be insignificant. He had only one lawsuit, filed it six years before serving as a juror in this case, it involved an automobile accident and not medical negligence, it settled before trial, he recovered only \$1,800 from the settlement, and he did not remember the names of the defendant or his own attorney in the matter until prompted during the post-trial hearing. The university and Bicalho were not prejudiced by the juror's nondisclosure. The juror was not intentionally withholding relevant information, and counsel for the university and Bicalho did not ask follow-up questions of other potential jurors who said they had filed lawsuits for injuries suffered in automobile accidents. Under the totality of the circumstances, the university and Bicalho's rights to a fair trial and an impartial jury were not compromised.